

Status of Judgment: Distributed

Appeal No. VA01/1/001,
VA01/1/012, VA01/1/013,
VA01/1/014

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 1988
VALUATION ACT, 1988

Port of Cork Company**APPELLANT**

and

Commissioner of Valuation**RESPONDENT**

RE: VA01/1/001 - Port and Land at Map reference 2, Bally Bricken; ED: Carrigaline, RD: Cork Lower, Cork County Council.

VA01/1/012 - Office at Map References 1.2/6 (Ground Floor), New Road, Ward: Tivoli B, UD: Mayfield, Cork.

VA01/1/013 - Office at Map Reference 3a Custom House Quay; Townland: Sundry Townlands, Ward: Centre A, UD: Centre East, Cork.

VA01/1/014 - Port at Custom House Quay, Ward: Centre A, UD: Centre East, County Borough of Cork

Public Purposes Exemption

B E F O R E

Fred Devlin - FSCS.FRICS**Deputy Chairman****Michael Coghlan - Solicitor****Member****John Kerr - MIAVI****Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 24TH DAY OF OCTOBER, 2001

By Notices of Appeal dated 30th March and 4th April 2001, the appellant appealed against the Determination of the Commissioner of Valuation in fixing rateable valuations on the hereditaments described above -

VA01/1/001 - £4,800, **VA01/1/012** - £39, **VA01/1/013** - £550, **VA01/1/014** - £3,000. The grounds of appeal as set out in the Notices of Appeal are : **VA01/1/001** - Port of Cork Company is not liable for rates and the rateable valuation as assessed is excessive. **VA01/1/012, VA01/1/013, VA01/1/014** - Rateable valuation is (1) Excessive (2) Inequitable (3) Port of Cork as successors to Cork Harbour Commissioners are exempt from rates.

The appeal proceeded by way of an oral hearing that took place on 9 July 2001 in the Tribunal Offices in Dublin. The appellant was represented by Dermot Gleeson SC with Patrick Dillon-Malone BL instructed by Eugene Glendon Solicitor, Port of Cork Company. The respondent was represented by Dan Feehan BL instructed by the Chief State Solicitor. Mr Des Killen of GVA Donal O Buachalla was also present on behalf of the appellant. Mr Shay Alyward B.Comm., ACCA, a staff valuer with twenty years experience in the Valuation Office was present on behalf of the respondent.

At the outset it was agreed by the parties that the appeals in relation to the port of Cork would be in the nature of a test case with the Tribunal's ruling being applied to other pending appeals by agreement between the parties. It was also agreed that the issue of rateability only would be dealt with at this oral hearing and that the matter of quantum would be dealt with following the determination of the issue of rateability by the Tribunal.

The Property

The Port of Cork is the principal port on the south coast of Ireland and the second port in the Republic. It is a natural, sheltered, deep-water port situated on the River Lee. It is located close to the main shipping routes to Northern Europe

Valuation History

- **Prior to 1998**, hereditaments occupied by Cork Harbour Commissioners were included in the exempt valuation lists.
- **In 1998**, the local authorities requested revision of the valuations. On revision, the revised valuations of all hereditaments occupied by Port of Cork Company were entered in the rateable valuation lists.
- The occupier was aggrieved by this revision and appealed to the Commissioner of Valuation. At first appeal the Commissioner confirmed the hereditaments as rateable.
- The appellant has appealed this decision to the Valuation Tribunal. At issue are both the quantum and the rateability of the valuation. However as noted above rateability is the only matter in issue at this hearing.

1. This appeal comes before the Tribunal by way of a test case on the net point as to whether the appellant and other Port Companies incorporated under section 7 of the Harbours Act 1996 are, in respect of port lands, entitled to exemption under the public purposes proviso of section 63 of the Poor Relief (Ireland) Act 1838.
2. For the purposes of this appeal it is common case that the port lands occupied by the appellant are rateable hereditaments within the meaning of the Valuation Acts.
3. Section 7 of the Harbours Act 1996 provides that companies may be established in order to make better provision in relation to the management, control, operation and development of certain harbours within the State.
4. Pursuant to Section 7 of the 1996 Act the Port of Cork Company was incorporated on the 28th February 1997 and the lands formerly vested in the Cork Harbour Authority became vested in the Port of Cork Company.

5. **The Appellant's Submissions.**

The appellant contended

1. That if it was the intention of the Oireachtas to make a company established pursuant to Section 7 of the Harbours Act 1996 liable for rates it would have done so in express words.
2. In the absence of an express provision it would be unjust to infer that companies incorporated pursuant to Section 7 would not be entitled to the long established exemption from rates enjoyed by the Harbour Authorities. Such a change in circumstance would be contrary to three fundamental canons of statutory construction as set out hereunder:
 - The requirement, which is more than a presumption, that statutes which allegedly create a new liability to taxes including rates should be construed strictly so as to avoid the imposition of liability being created unfairly by the use of oblique or slack language, let alone by silence or by inference.
 - The presumption against oblique or unclear changes in the law.
 - The presumption against unnecessary or imprecise interference with property rights.

3. The fact that Section 15 (5) of the Valuation Act 2001 expressly provides that a harbour “in respect of which a company is established pursuant to Section 7 of the Harbours Act 1996” is not entitled to exemption provides strong support for the conclusion that the provisions of the 1996 Act taken alone did not have the effect of altering the valuation status of the harbour authorities incorporated under Section 7 of the 1996 Act.

4. The fact that the ownership of the port lands is now vested in the Appellant as a private company does not itself alter the fact that the user of the Port is available to all the subjects of the Realm and that it is used for the public benefit of the whole community and not for the private or exclusive use of any particular class or section of it. Furthermore the degree of management and control exercised by the appellant is no more than is required to run a modern port facility in the interest of the public at large and to make its facilities available to the public at large without restriction. In the circumstances the appellant should be exempt from the payment of rates under the proviso contained in Section 63 of the Poor Relief (Ireland) Act 1838.

5. Whilst the appellant is now incorporated as a Company pursuant to Section 7 of the Harbours Act 1996, it is clear, from Sections 11 (1), 17 (2) and 18 of the Act, the objects and articles of a Section 7 company taken together with Section 44, governing the general powers of the Minister for the Marine, that the Appellant is bound to carry out its activities exclusively for public purposes and not for any private profit or use.

6. The appellant is not in business for the purpose of making a private profit on its own account and is bound to seek altruistically the benefit of the public.

7. Although the appellant has a general duty under Section 12(1) (a) of the 1996 Act to ensure that its revenues are sufficient to meet its operating costs, the appellant is emphatically not a private profit making company. Its sole owners are the Minister for the Marine and the Minister for Finance and in the event that they receive dividends or other sums they are obliged by the 1996 Act to pay into or dispose of such sums for the benefit of the Exchequer in

such manner as he or she may direct but always in the public interest. Furthermore under Section 44 (4) of the Act it is clear that any dividend policy nominally enjoyed by the directors of the company is subject to the reserved power of these ministers to stipulate the dividends to be paid by the company to them. It follows therefore that the appellant has no private beneficial interest in the company and hence should have the benefit of exemption under Section 63.

8. No significance should be attached to the appellant company's structure nor should it be inferred therefrom that the activities of the company are being carried out for private profit or use.

The Respondent's Contentions

1. The appellant company was incorporated on the 28th February 1997 and the port lands previously held by the Harbour Commissioners became vested in the company and thereby became rateable as the property was no longer used or dedicated to public purposes.
2. Whilst Section 44 of the 1996 Act gives the Minister of the Marine a broad control of a company incorporated pursuant to Section 7, it does not vest any of the property of the company in the Minister. It is also clear from Section 44 that whilst the minister has powers in relation to matters of policy, the Minister has no role in the day to day running of the company. Indeed the Minister can only exercise such powers as he or she may have under Section 44 following consultation with the company.
3. A proper interpretation of the functions of a company incorporated pursuant to Section 7 indicates that such a company is a private company (albeit amenable to the policies and directions of the Minister) and cannot be viewed as belonging to the Government nor can it be argued that each member of the public has an interest in the property vested in the company. In fact the role of the Minister is so proscribed by the Act particularly in relation to the control of the company's assets, that it cannot be argued that the company is merely an agent of the Minister.

4. The appellant is a private company capable of making a private profit that is sufficiently distinct from the government that the proviso contained in Section 63 of the 1838 Act does not apply. Furthermore a Section 7 company is entitled to take private property, which is not consistent with the public purposes, which are required in order to allow the proviso to operate.

Findings

The Tribunal has carefully considered all the submissions made by the parties and reviewed the considerable volume of case law referred to it and makes the following findings:

1. This appeal must be determined in the light of the existing Valuation Acts and no regard can be had to anything contained in the Valuation Act 2001.
2. Prior to the establishment of the appellant company Cork Harbour was under the control of the Cork Harbour Commissioners and entitled to exemption from the payment of rates under Section 63 of the Poor Relief (Ireland) Act 1838.
3. Rates is a form of local taxation based upon the beneficial occupation of property and an occupier is defined in Section 124 of the Poor Relief (Ireland) Act 1838 as “ every person in the immediate use of or enjoyment of any hereditament rateable under this Act whether corporeal or incorporeal”.

It is common case that the occupier is the Port of Cork Company and that the property occupied by the company is a rateable hereditament within the meaning of the Valuation Acts.

4. It is clear from Section 124 above referred to, that all occupiers are liable for rates unless they are distinguished as being exempt in the Valuation List. The Supreme Court has stated that exemption from rates unless specifically provided by other statutes is to be found in the proviso to Section 63 of the Poor Relief (Ireland) Act 1838 which states as follows:

“provided also that no church, chapel or other building exclusively dedicated to religious worship or exclusively used for the education of the poor, nor any burial ground or cemetery, nor any infirmary, hospital, charity school or other building use exclusively for charitable purposes nor any building, land

or hereditament dedicated to or used for public purposes shall be rateable except where any private profit or use shall be directly derived therefrom in which case the person deriving such profit or use shall be liable to be rated as an occupier according to the annual value of such profit or use.”

5. It follows from the above that exemption from rates is a function of the status of the occupier and or the user of the property rather than the nature of the property itself. Consequently a change of occupier and or user can have the immediate effect of making a property previously exempt from rates liable to rates with immediate effect and in the opinion of this Tribunal this may happen seamlessly by the operation of the Valuation Acts. In the circumstances of this appeal the Tribunal does not accept the contention of the Appellant that it was necessary for the Harbours Act 1996 to make express provision for the payment of rates by companies incorporated pursuant to Section 7 and that in the absence thereof the exemption previously enjoyed by the Cork Harbour Commissioners should automatically transfer to the Port of Cork Company. Since the company was only incorporated in February 1997 it cannot be successfully argued that the lack of exemption will create a new liability to taxes.
6. The test that premises are used for public purposes as set out in Mr. Justice Keane’s book entitled “The Law of Local Government in the Republic of Ireland” at page 197 is if:
 1. “It belongs to the government;
 2. Each member of the public has an interest in the property.”

It is clear from the facts that the property which is the subject of this appeal does not meet the first test as the lands in question are vested in the Port of Cork Company. Hence it follows that if the subject lands are to be exempt they must meet the decisive test i.e. that the nature of the occupation is dedicated to or used for public purposes.

7. Over many years the meaning and application of the words “public purposes” has on several occasions been subject to scrutiny. Perhaps the best illustration of the point is the following extract from the judgment of Kenny J. in *Trinity College v Commissioner of Valuation* [1919 IR 519],

“it is sufficient for me to say that in all the authorities where the question of the meaning and application of the words ‘used for public purposes’ or ‘altogether of a

public nature’ or ‘used exclusively for public purposes’ has arisen, it has been uniformly determined that the ‘user’ essential in order to establish the exemption must be available for all the subjects of the realm; the ‘purposes’ must be purposes in which every member of the community has an interest; and the premises must be used for the public benefit of the whole community and not for the private or exclusive use of any members or any particular class or section of it”.

8. The Harbours Act 1996 was introduced in order to “to make further and better provision in relation to the management, control, operation and development of certain harbours, to enable the Minister for the Marine with the consent of the Minister for Finance to establish companies in respect of certain harbours for that purpose and to define the functions of the company so established”.

In the circumstances of this appeal the following sections are considered to be relevant in the determination of this appeal: -

- A) **Section 96** provides that all land which was previously vested in the Harbour Commissioners is now vested in the Port of Cork Company, a private company established pursuant to the provisions of Section 7 of the Act.
- B) **Section 10** provides that the Memorandum of Association of a company incorporated under Section 7 shall be “ in such form consistent with the Act as may be approved by the Minister with the consent of the Minister for Finance.”
- C) **Section 11** provides that the principal objects of a company incorporated under Section 7 shall be stated in its Memorandum of Association to be:
 - (a) To take all proper measures for the management, control, operation and development of its harbour and the approach channels thereto.
 - (b) To provide such facilities, services, accommodation and lands in its harbour for ships, goods and passengers as is considered necessary.
 - (c) To promote investment in its harbour and to engage in any business activity either alone or in conjunction with other persons that it considers to be advantageous to the development of its harbour.

(d) To utilise and manage the resources available to it in a manner consistent with the objects aforesaid.

D) **Section 12** provides that it shall be the general duty of a Section 7 company:

- (a) to conduct its affairs so as to ensure that the revenues of the company are not less than sufficient taking one year with another to-
 - i Meet all charges which are properly chargeable to its revenue account.
 - ii Generate a reasonable proportion of the capital it requires and
 - iii Remunerate its capital and pay interest on and repay its borrowings,
- (b) To conduct its business at all times in a cost effective and efficient manner.

E) **Sections 20, 21 and 22** provide that all the shares in the company are held solely by or on behalf of the Minister for the Marine and the Minister for Finance and any dividends or other money received by them shall be paid into or disposed of for the benefit of the Exchequer in such manner as he or she may direct.

F) **Section 23** provides that the company may borrow money for capital purposes with the consent of the Minister for the Marine and the Minister for Finance subject to certain conditions and that the level of borrowings may be regulated by the Minister for Finance.

F) **Section 27** provides that without prejudice to the requirements of the Companies Acts, the appellant company is required to keep all proper and usual accounts of all monies received and expended by it and be subject to an annual audit, a copy of which audit report shall be presented to the Minister for the Marine. The company is also required to provide an annual report and Chairman's report to the Minister which reports, together with the auditors report, shall be laid before each house of the Oireachtas.

H) **Section 44** of the Act provides in subsection (1) that the Minister may, after consultation with the company, give a direction in writing to a company requiring it to comply with policy decisions of a general kind made by the Minister in relation to-

- (a) The development of harbours,

- (b) The safety of ships, navigation and operations generally in harbours,
- (c) The levels of harbour charges imposed by a company or companies,
- (d) The acquisition or disposal of lands by a company or companies
(including by way of the grant of a lease), or
- (e) Any other matters affecting the functions of a company or companies.

44.(2) A Company shall comply with a direction given to it under *subsection* (1).

44.(3) *Subsection* (1) shall not be construed as enabling the Minister to exercise any power or control in relation to the performance in particular circumstances by a company of a function conferred on it by or under this Act.

44.(4) (a) The Minister may stipulate, in consultation with the company and with the consent of the Minister for Finance, financial or other targets to be achieved by a company. In stipulating such targets the Minister shall have due regard to any direction he or she has given to the company concerned under *subsection* (1).

(b) The Minister may having due regard to the capacity of the company concerned to achieve the financial targets that have been stipulated under *paragraph* (a) in respect of it and after consultation with the Minister for Finance, stipulate the dividends to be paid by a company in respect of the shares held in its share capital.

9. It is clear from the above and elsewhere in the Act that the Minister for the Marine has a continuing role in the operation of the company which may be exercised only after consultation with the company in relation to “policy decisions of a general kind”. It is also clear from the above sections that the Minister intended to grant to Section 7 companies a large degree of autonomy in the day-to-day management and operation of their affairs. Nonetheless the Minister for the Marine and the Minister

for Finance as sole shareholders have the right to receive all dividends and under Section 44 (4) (b) the Minister for the Marine following consultation with the Minister for Finance, may stipulate the dividends to be paid in certain circumstances.

10. In accordance with its Memorandum and Articles of Association the appellant company has the powers to sue and be sued in its own name and “to take all proper measures for the management, control, operation and development of its harbour and the approach channels thereto.” The appellant company may also appropriate any part of its harbour to the exclusive use of any person for the purpose of any trade or profession in consideration of the payment to it of such charges as the company considers reasonable.
11. There is nothing in the 1996 Act or in the Memorandum of Association that precludes a Section 7 company from making a profit as such and indeed the company may invest the funds of the company not immediately required for its business in such manner as may from time to time be determined by the directors. Furthermore the company may accumulate capital for any of the purposes of the company and appropriate any of the company’s assets to specific purposes either conditionally or unconditionally.
12. Subject to such control as the Minister for the Marine may exercise and its obligations under the 1996 Act the company is free to conduct its affairs and utilise its assets as it sees fit and not in a manner consistent with the proposition that it is merely acting as an agent of the Minister. However, this does not alter the fact that the port lands are vested in the sole ownership of the port company which under section 15 is empowered to acquire and dispose of any of its lands, (whether by sale or the grant of a lease), subject only to Section 15(4)(a) which requires that the company shall have regard to any government policy or guideline in relation to the acquisition of land by state enterprises which is or are for the time being extant.
13. While some of the activities of the appellant company such as the promotion of leisure activities that may be carried on in its harbour or which relate to the marine in general, may be of a public nature, it is clear that the primary and overriding aims of the appellant company are as set out in Article 2 of the Memorandum of Association.

- a. to take all proper measures for the management control and operation and development of its harbour and the approach channels thereto.
- b. to provide such facilities services accommodation and lands in its harbour for ships goods and passengers as it considers necessary.

The company has as its subsidiary objectives with a view to carrying into effect the foregoing main objectives. Memorandum of Association, Article 3

- 1) *To take such steps either alone or in conjunction with other persons as are necessary for the efficient operation and management of its harbour.*
 - 2) *To appropriate any part of its harbour to the exclusive use of any person for the purposes of any trade or profession in consideration of the payment to it of such charges as the company considers reasonable.*
 - 8) *Subject to section 15 of the Harbours Act, 1996 to lease, sell, exchange or otherwise dispose of any land belonging to it.*
 - 10) *To make use of, manage or otherwise utilise any resources of its estate.*
 - 19) *To have due regard for customer needs and provide any services required where possible and within reason.*
14. Under section 13 (1) of the **Harbours Act, 1996**, the company may impose harbour charges at such rates as are from time to time to be determined by the company on
- (a) the owner or master of a ship which-
 1. enters within its harbour,
 2. uses any quay, anchorage or mooring in its harbour, or
 3. plies within its harbour
 - (b) the owner, consignor, consignee or carrier of goods shipped, transhipped, unshipped or stored within its harbour,
 - (c) the owner or master of a ship which carries passengers to or from a place within its harbour,
 - (d) a person for whom any service or facility is performed or provided by it or to whom it hires any equipment.

In addition to the above the company may impose charges for a range of other services and facilities it may perform or provide to users of the port.

Determination

15. From the above it is clear that the objectives of the company are primarily aimed at meeting the needs and demands of the users of the harbour who have to pay the prescribed charges set down by the company. It follows therefore that the main and primary user of the port lands is restricted to this particular section of the community and not those of the public at large and hence do not meet the test of Kenny J. in the Trinity College case “the purposes must be purposes in which every member of the community has an interest; and the premises must be used for the public benefit of the whole community, and not for the private or exclusive use of any members or any particular class or section of it.”

Having regard to the foregoing the Tribunal determines that the subject premises should not be distinguished as being exempt by virtue of the proviso contained in Section 63 of the Poor Relief (Ireland) Act 1838.